

2004

Electronic Discovery Disputes: Will the Eighth Circuit Courts Move beyond Ad-hoc Decision Making?

Lynn Jokela

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Jokela, Lynn (2004) "Electronic Discovery Disputes: Will the Eighth Circuit Courts Move beyond Ad-hoc Decision Making?," *William Mitchell Law Review*: Vol. 30: Iss. 3, Article 7.
Available at: <http://open.mitchellhamline.edu/wmlr/vol30/iss3/7>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

**COMMENT: ELECTRONIC DISCOVERY DISPUTES:
WILL THE EIGHTH CIRCUIT COURTS
MOVE BEYOND AD-HOC DECISION MAKING?**

Lynn Jokela[†]

I. INTRODUCTION.....	1031
II. FEDERAL RULES GOVERNING ELECTRONIC DISCOVERY.....	1033
III. ELECTRONIC EVIDENCE DISPUTES: HOW DO THE EIGHTH CIRCUIT COURTS DECIDE THE ISSUES?	1036
A. <i>Access to Electronic Evidence</i>	1037
B. <i>Electronic Discovery Cost Disputes</i>	1040
C. <i>Evidence Spoliation</i>	1048
IV. CONCLUSION	1054

I. INTRODUCTION

Today, trial attorneys face an array of challenges resulting from the proliferation of electronic evidence.¹ The volume of electronic evidence continues to mushroom as individuals increase e-mail usage as a means of communication in lieu of the telephone.² Further, studies have shown a rapid increase in the

[†] J.D. Candidate 2005, William Mitchell College of Law; M.B.A., University of Wisconsin, Madison, 1989; B.S., Finance, Real Estate & Insurance, Minnesota State University, Mankato, *cum laude*, 1986.

1. David H. Schultz & J. Robert Keena, *Discovery Challenges in the Electronic Age*, 24 PA. LAW. 24, 24 (Sept.-Oct. 2002); *see also* 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 2218, at 450 (2d ed. 1994) (stating that computers and electronic media store a large amount of information that is subject to litigation).

2. Hon. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 328 (2000); *see* Grace V. Bacon, *The Fundamentals of Electronic Discovery*, 47 B. B. J. 18, 18 (Mar./Apr. 2003) (citing Wired Media (Dec. 27, 2002), at http://www.wiredmedia.co.uk/news_full.asp?IDW297 (stating that approximately 31 billion e-mail messages were sent each day in 2002)); *see also* Ronald Raether, *E-Mail Maelstrom*, 13-Oct. BUS. L. TODAY 57, 57 (Sept./Oct. 2003) (estimating generation of more than 17.5 trillion electronic documents annually by 2005); META GROUP RESEARCH TREND, CONTENT AND COLLABORATION RESEARCH TRENDS FOR 2003/2004, at <http://www>.

revenue generated by consumer Internet purchases.³ Currently, electronic evidence comprises between thirty and seventy percent of all evidence in litigation matters.⁴ As organizations and individuals continue to implement advanced technologies, litigation discovery complications will only increase.⁵ Technological advances not only simplify our daily lives, but also create data trails subject to electronic discovery.⁶

Compared with paper documents, electronic documents are much more difficult to destroy.⁷ Once a document moves from a creator's computer to a network server, a backup system makes a copy and can store the document indefinitely.⁸ A common misunderstanding is that once a user deletes an e-mail or a document from his or her personal computer, the e-mail or document cannot be recovered.⁹ However, advances in technology increase the likelihood that a shredded paper document or deleted e-mail is available on a backup system somewhere.¹⁰

In framing a case, trial attorneys often seek to find the "smoking gun" in electronic form.¹¹ E-mail increasingly provides

metagroup.com/cgi-bin/inetcgi/jsp/displayArticle.do?oid=42394 (stating that "[t]hrough 2007, rising electronic communication volumes will frustrate users coping with information overload.") (copy on file with author).

3. See Scheindlin & Rabkin, *supra* note 2, at 328 (stating that in 1996 consumer purchases over the Internet totaled approximately \$289 million and rose to \$26 billion in 2001); see also Linda Rosencrance, *Report: Online holiday shopping up 35% from 2002*, COMPUTERWORLD (Jan. 6, 2004), available at <http://www.computerworld.com/managementtopics/ebusiness/story/0,10801,88789,0,0.html?SKC=ebusiness-88789> (last visited March 20, 2004) (stating that during the 2003 holiday season alone, consumers spent \$18.5 billion, increasing 35% over the \$13.7 billion spent during the 2002 holiday season).

4. Compare J. Robert Keena, *E-Discovery: Unearthing Documents Byte by Byte*, 59 BENCH & B. MINN. 25, 25 (Mar. 2002) (stating that as much as thirty percent of all evidence is maintained in electronic form) with Schultz & Kenna, *supra* note 1, at 27 (stating that seventy percent of all data is presently stored in electronic form).

5. Schultz & Kenna, *supra* note 1, at 27.

6. *Id.*

7. David Cearley et al., *Enron Investigation Shows Importance of Proper Document Archive and Destruction Practices*, META Group News Analysis (Feb. 11, 2002), at <http://www.metagroup.com/cgi-bin/inetcgi/jsp/displayArticle.do?oid=29234> (last visited March 20, 2004) (discussing how investigators in the Enron case searched server backup tapes for electronic records to recover copies of documents reportedly shredded by Arthur Andersen) (copy on file with author).

8. *Id.*

9. Mary Kay Brown & Paul D. Weiner, *Digital Dangers: A Primer on Electronic Evidence in the Wake of Enron*, 74 PA. B. ASS'N. Q. 1, 3 (Jan. 2003).

10. Cearley et al., *supra* note 7, at 1.

11. Scheindlin & Rabkin, *supra* note 2, at 329.

the crucial piece of information that determines the outcome of a case.¹² Given the importance of discovery in litigation, coupled with the increased use of computers to generate information, courts will most likely see a rise in the number of discovery disputes resulting from electronic discovery.¹³

This comment begins by exploring the federal rules relevant to discovery of electronic evidence.¹⁴ Section three introduces issues resulting from advances in technology and the 1970 amendment to Rule 34(a) of the Federal Rules of Civil Procedure (FRCP).¹⁵ Section three also studies examples of how district courts in the Eighth Circuit have resolved electronic discovery disputes involving the manner and means of accessing information, discovery cost issues, and accusations of lost or destroyed information.¹⁶ Courts, including the Eighth Circuit, apply discretion when determining how to resolve electronic discovery disputes.¹⁷ The comment suggests that until courts adopt guidelines for managing electronic discovery disputes or the rule drafters amend the federal rules to encompass electronic discovery issues, attorneys will be left guessing how courts might resolve the disputes.¹⁸ Until that day, attorneys should remain cognizant that case-specific details will guide the court's use of discretion.¹⁹

II. FEDERAL RULES GOVERNING ELECTRONIC DISCOVERY

One purpose of the federal rules governing discovery is to promote efficiency.²⁰ Although discovery rules are intended to facilitate an orderly and cost-effective discovery process between the parties, courts are still called upon to provide guidance and control.²¹ Courts step in to help resolve disputes involving electronic discovery issues because the pertinent discovery rules do not adequately address problems created by the discovery of

12. *Id.*

13. *Id.* at 341.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part III.A-C.

17. *See infra* Part IV.

18. *See id.*

19. *See id.*

20. *See* FED. R. CIV. P. 1 (stating the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action").

21. MANUAL FOR COMPLEX LITIGATION (THIRD) § 21.42 (1995).

electronic information.²²

In 1970, FRCP 34(a) was amended to address issues brought about by the advent of the computer age.²³ Originally, Rule 34(a) simply permitted a party to request production of documents or tangible things.²⁴ The 1970 amendment to Rule 34(a) defined documents as including other “data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.”²⁵ This inclusive definition of documents reflected changing technology.²⁶

Rule 34(a) permits discovery of documentary information stored on computers whether on hard disk, back-up tapes, or other peripheral devices.²⁷ Further, the Advisory Committee Notes state that the 1970 Amendment to Rule 34(a) applies to “electronic data compilations from which information can be obtained only with the use of detection devices”²⁸

Practitioners accept that Rule 34 allows discovery of information stored on a computer.²⁹ However, Rule 34 does not address issues related to the manner and means for such information disclosure.³⁰ As a result, the discovery burden in terms

22. See Jason Krause, *E-Discovery Order Changing the Rules, Federal Decision Deals with Who Pays the Costs*, 22 A.B.A. J. E-REP. 1 (June 6, 2003) (noting that pre-trial discovery motions are usually invisible but a complicated question for courts is how to handle the mountains of electronic evidence that are available for discovery); see also Scheindlin & Rabkin, *supra* note 2, at 346-51 (concluding that Rule 34 has shortcomings and noting that courts may not be able to address new issues resulting from electronic discovery under Rule 34).

23. WRIGHT ET AL., *supra* note 1, § 2218, at 450.

24. See *id.* § 2201, at 352. The original Rule 34(a) provided the following:

Upon motion of any party showing good cause therefore and upon notice to all other parties, the court . . . may order any party to produce and permit the inspection and copying or photographing by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things

FED. R. CIV. P. 34(a) (1968) (amended 1970).

25. WRIGHT ET AL., *supra* note 1, § 2218, at 450.

26. FED. R. CIV. P. 34(a) advisory committee’s note.

27. See ROGER S. HAYDOCK & DAVID F. HERR, *DISCOVERY: THEORY, PRACTICE, AND PROBLEMS* § 4.16 (1983) [hereinafter *DISCOVERY: THEORY, PRACTICE & PROBLEMS*] (stating that documentary information, whether stored on punched data cards, electronic disks, or computer banks, is discoverable).

28. FED. R. CIV. P. 34(a) advisory committee’s note.

29. WRIGHT ET AL., *supra* note 1, § 2218, at 451.

30. *DISCOVERY: THEORY, PRACTICE & PROBLEMS*, *supra* note 27, § 4.16; see FED. R. CIV. P. 34(a) advisory committee’s note (“[I]f the discovering party needs to

of discovery scope and cost is placed on the party responding to a discovery request.³¹

FRCP Rule 26 operates to relieve the discovery burden placed upon the responding party by prohibiting cumulative or duplicative discovery requests.³² Rule 26(b)(1) permits discovery of matters that are “relevant to the claim or defense” as long as “the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”³³ Although the discovery scope under Rule 26 appears quite broad, it does provide an inherent proportionality test.³⁴ Rule 26 requires consideration of the burden of producing the information along with the potential benefit of the requested information to determine whether information must be produced.³⁵ Therefore, even in complex litigation, discovery does not warrant uncovering every piece of evidence.³⁶

Rule 26 does not, however, directly provide guidance regarding how much information a party should produce, or which party should bear the expense of costly electronic discovery.³⁷ Because of the void in Rule 26, practitioners predict the number of electronic discovery disputes will surge.³⁸ This comment draws attention to a deficiency in the federal rules in terms of a general inability to manage electronic discovery problems.³⁹ Today, complicated questions commonly arise when discovery involves a request for computerized information.⁴⁰ Case law continues to

check the electronic source itself, the court may protect respondent with respect to . . . confidentiality of nondiscoverable matters.”).

31. FED. R. CIV. P. 34(a) advisory committee’s note.

32. See FED. R. CIV. P. 26(b)(2)(i) (stating the court shall limit discovery if it determines that “the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive”).

33. FED. R. CIV. P. 26(b)(1).

34. FED. R. CIV. P. 26(b)(2)(i).

35. See FED. R. CIV. P. 26(b)(2)(iii) (stating a court can limit discovery when “the burden or expense of the proposed discovery outweighs its likely benefit”).

36. MANUAL FOR COMPLEX LITIGATION (THIRD) § 21.41 (1995).

37. See *Zubulake v. UBS Warburg, L.L.C.*, 216 F.R.D. 280, 283-84 (S.D.N.Y. 2003) (providing a seven-factor guideline to help determine which party should bear the cost of electronic discovery); *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002), *aff’d*, No. 98 Civ.8272(RPP) 2002 WL 975713 (S.D.N.Y. May 9, 2002) (providing an eight-factor guideline to help determine which party should bear the cost of electronic discovery).

38. Scheindlin & Rabkin, *supra* note 2, at 341.

39. See *infra* Part III.

40. 1A DAVID F. HERR & ROGER S. HAYDOCK, MINNESOTA PRACTICE SERIES: CIVIL RULES ANNOTATED, § 34.12, at 191 (4th ed. 2002); see also Schultz & Keena,

guide how parties should address the issue of the manner and means for disclosure of computerized information.⁴¹

III. ELECTRONIC EVIDENCE DISPUTES: HOW DO THE EIGHTH CIRCUIT COURTS DECIDE THE ISSUES?

Use of electronic evidence presents challenges for litigators and courts not only in terms of the manner and means of accessing the information,⁴² but also in terms of which party should bear the cost of electronic discovery,⁴³ where to look for the information,⁴⁴ and spoliation of evidence.⁴⁵ The Federal Rules of Civil Procedure leave the decisions regarding procedures for discovering electronic evidence to the courts.⁴⁶ The outcomes of electronic discovery

supra note 1, at 27 (stating that “technological developments . . . create trails of data complicating legal discovery”).

41. HERR & HAYDOCK, *supra* note 40, § 34.12, at 191. *Cf.* Scheindlin & Rabkin, *supra* note 2, at 381-82 (noting that the time is right for the legal community to focus on nationwide use of technology and the need for amendments to the existing rules to provide decisional law addressing the special properties of information technology).

42. DISCOVERY: THEORY, PRACTICE & PROBLEMS, *supra* note 27, § 4.16.

43. *See* *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (noting the district court must exercise its discretion in deciding which party should incur the cost of complying with a discovery order); *see also* Brown & Weiner, *supra* note 9, at 14 (noting that courts are adopting new approaches to determine which party should bear the expense of electronic discovery and that the *McPeck* court reviewed cases that involved cost shifting and characterized the cases as “idiosyncratic and provid[ing] little guidance”) (citing *McPeck v. Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001)).

44. Bacon, *supra* note 2, at 19.

45. *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 619 (2001) (defining spoliation as “a litigant’s destruction of evidence that is either relevant to the litigation or reasonably calculated to lead to the discovery of admissible evidence, in violation of a duty to preserve that evidence”) (citing *Linnen v. A.H. Robins Co.*, No. 97-2307, 1999 WL 462015, at *11 (Mass. App. Ct. June 16, 1999)); *see also* Ian C. Ballon, *How Companies Can Reduce the Costs and Risks Associated with Electronic Discovery*, 15 No. 7 COMPUTER LAW. 8, 9 (July 1998) (describing spoliation as “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence, in pending or future litigation”).

46. *See* FED. R. CIV. P. 34(a) advisory committee’s note (stating in many instances respondent will need to supply a printout of computer data, and the burden placed on respondent will vary from case to case); *see also* *Oppenheimer Fund*, 437 U.S. at 358 (noting the district court must exercise its discretion in deciding which party should incur the cost of complying with a discovery order); *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652-54 (D. Minn. 2002) (discussing procedures previously used by parties in other cases when resurrecting data, and outlining how the plaintiff should proceed in resurrecting electronic data); Scheindlin & Rabkin, *supra* note 2, at 381-82 (noting the “specter of

disputes in the Eighth Circuit courts⁴⁷ are unpredictable because courts apply discretion in resolving the disputes.⁴⁸

A. Access to Electronic Evidence

Computer systems vary from one organization to another.⁴⁹ Consequently, questions arise regarding the most efficient means of accessing computerized information.⁵⁰ A leading case to address whether the responding party must make the computerized information available in a computer-readable format is *National Union Electric Corp. v. Matsushita Electric Industrial Co.*⁵¹

In the context of the manner and means of accessing electronic evidence, an Eighth Circuit court, in *Antioch Co. v. Scrapbook Borders, Inc.*, referred to other circuits for guidance.⁵² In *Antioch*, the court addressed the issue of whether to grant a motion to expedite discovery of computer equipment to investigate the electronic content.⁵³ The plaintiff moved to expedite discovery out of a concern that the defendants might destroy documents relevant

immense confusion” inherent in electronic discovery and the need for amendments to discovery rules to effectively govern electronic discovery).

47. While the Eighth Circuit has yet to address the issue, as discussed in this article, various district courts within the Eighth Circuit have resolved electronic discovery disputes in a reactive manner, on a case-by-case basis.

48. See *Toghyany v. AmeriGas Propane, Inc.*, 309 F.3d 1088, 1093 (8th Cir. 2002) (applying discretion in determining which party should bear the cost of electronic discovery); *Antioch*, 210 F.R.D. at 652-53 (applying compromise from two previous district court decisions in the Seventh and Ninth circuits in determining how to direct parties to resurrect data); *Lexis-Nexis v. Beer*, 41 F. Supp. 2d 950, 954-56 (D. Minn. 1999) (applying discretion in awarding sanctions).

49. Cf. Matt Cain, *E-Mail Off and On the Record: Part I*, META Group Research—Delta Summary (Oct. 16, 2002), at <http://www.metagroup.com/cgi-bin/inetcgi/jsp/displayArticle.do?oid=33595> (last visited March 20, 2004) (discussing e-mail storage requirements and noting the multitude of e-mail archival systems) (copy on file with author).

50. See *WRIGHT ET AL.*, *supra* note 1, § 2218, at 452-53 (noting that initial disclosures discussed during the Rule 26(f) conference can facilitate the process of identifying the most efficient means of access to computerized information).

51. See *id.* § 2218, at 451-52 (citing *Nat'l Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257 (D.C. Pa. 1980) (referencing defendants' request that plaintiff provide a computer tape of information previously provided in a computer printout because of the extensive time required for inputting the information into a computer for analysis purposes)).

52. See *Antioch*, 210 F.R.D. at 652-54 (applying compromise from two previous district court decisions in the Seventh and Ninth circuits regarding the process for resurrecting data from respondent's computers).

53. *Id.* at 650.

to the litigation.⁵⁴ In addition, the plaintiff requested that the court appoint a neutral computer forensics expert.⁵⁵

The plaintiff believed that the defendants' continued use of a computer, where data remained on the computer's hard drive, would overwrite the data and make the data irretrievable.⁵⁶ Further, because the data contained product development data and the parties were direct competitors, the plaintiff requested that a computer forensics expert retrieve the stored data to ensure recovery and preservation of the information.⁵⁷ Although the defendants opposed the motions because the parties had not held a Rule 26(f) discovery conference, the court granted the plaintiff's motions.⁵⁸

In reaching its conclusion, the *Antioch* court noted that even though the parties had not held a Rule 26(f) discovery conference, discovery should commence in order to ensure preservation of computer records.⁵⁹ The court noted that by allowing discovery to commence earlier than usual, the parties would still have the same amount of time to respond to discovery as allowed by the federal rules.⁶⁰ Finally, when granting the plaintiff's motion for the court to appoint a computer forensics expert, the *Antioch* court referenced cases from courts within the Seventh and Ninth circuits when outlining the manner and means to recover the information.⁶¹

Specifically, the *Antioch* court allowed the plaintiff to select an expert of its choice in the computer forensics field.⁶² Next, the court ordered the defendants to make all of their computer equipment available to the expert at the defendants' place of

54. *Id.*

55. *Id.*; see also Dan Verton, *Let the Pros Investigate Computer Crimes*, COMPUTERWORLD, (July 15, 2002), available at <http://www.computerworld.com/printthis/2002/0,4814,72659,00.html> (last visited March 20, 2004) (defining computer forensics as the "identification, extraction, preservation and documentation of computer evidence that will stand up to legal challenges about its authenticity, accuracy and integrity").

56. *Antioch*, 210 F.R.D. at 650-51.

57. *Id.*

58. *Id.* at 651-53.

59. *Id.* at 651.

60. *Id.*

61. See *id.* at 652-53 (referencing *Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000) and *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1053 (S.D. Cal. 1999)).

62. *Antioch*, 210 F.R.D. at 653.

business at a mutually agreeable time.⁶³ Further, the expert was to use best efforts to avoid any unnecessary disruptions to the defendants' business activities.⁶⁴ The court directed the parties to determine an appropriate time for the expert to access the defendants' computer equipment bearing in mind the interest in minimizing the burden and inconvenience caused to the defendants.⁶⁵ Regarding confidentiality, the court specified: (1) the expert was to avoid inconveniencing the defendant, "up to and including the retention of computer equipment on defendants' premises[.]" (2) the only people authorized to access the equipment were the expert and employees of the expert, and (3) the expert was to maintain all information in the strictest confidence.⁶⁶

The *Antioch* court's order involved a complex sequence of events, beginning with the computer forensics expert issuing a report to the parties detailing the actions he took with regard to each piece of equipment the defendants produced.⁶⁷ In addition, the computer expert was to produce two copies of the resulting data and transmit one copy of the data to the court and the other to the defendants.⁶⁸ The defendants would then sift through the data produced by the expert to locate any relevant documents and provide them to the plaintiff along with a privilege log.⁶⁹

The court built into its order a method of resolving any disputes that might arise under this system. In the event the plaintiff disputed an allegedly privileged claim, or claimed the existence of additional relevant documents, the court would conduct an in-camera review.⁷⁰ Unless modified by another court, the procedure outlined by the court would govern the information recovery process.⁷¹

Antioch illustrates how specific facts, rather than a general guideline, lead a court to resolve issues that arise in dealing with electronic information. At its most basic level, *Antioch*

63. *Id.*

64. *Id.* A privilege log would describe the nature of any privileged documents and allow the plaintiff to assess the applicability of the privilege claimed. *Id.* at 653-54.

65. *Id.* at 654.

66. *Id.* at 653.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 654.

71. *Id.*

demonstrates that accessing electronic information is not as simple as providing a paper document to the other party. At the time of the decision, the absence of clear guidelines detailing how to manage access to electronic information led the court to outline an extensive process based on the case-specific facts. Although further discovery disputes were not reported in *Antioch*, additional case analysis illustrates that problems continue to loom when parties request electronic information.⁷²

B. *Electronic Discovery Cost Disputes*

The increased cost of discovery, always an important consideration, is a second issue resulting from increased use of computerized information.⁷³ Typical paper discovery requires the producing party to bear the financial expense of producing documents.⁷⁴ A party may encounter an undue cost burden when attempting to produce computerized information in response to a request for such information.⁷⁵ Courts, however, retain discretion to shift the expense to the other party when it is unduly burdensome.⁷⁶ As a result, attorneys are often left to guess how the

72. See *infra* Part III.B-C (analyzing the Eighth Circuit courts' resolution of electronic discovery disputes in additional matters).

73. See JAY E. GRENIG & JEFFREY S. KINSLER, HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE, § 13.12 (2d ed. 2002 & Supp. 2003) (discussing the cost of producing computerized information); see also Brown & Weiner, *supra* note 9, at 14 (noting the significant costs associated with electronic discovery); Peter Brown, *Discovery and Use of Electronic Evidence*, 734 PRACTICING L. INST. 391, 398 (2003) (noting that costs increase significantly when special equipment or programming expertise is needed to extract electronic data from outmoded technology formats).

74. See GRENIG & KINSLER, *supra* note 73, § 13.12 (citing WRIGHT ET AL., *supra* note 1, § 2218) (stating a responding party ordinarily bears the cost of producing information in cases where the responding party is required to provide a print-out or otherwise make the information reasonably usable); see also Krause, *supra* note 22, at 1 (noting that in the world of paper discovery, it is widely assumed that the producing party bears the burden of producing documents).

75. See GRENIG & KINSLER, *supra* note 73, § 13.12. (citations omitted) (noting the cost of producing information may be an issue when requested e-mail or voice-mail messages have been erased from a hard disk but the party is capable of retrieving the information using sophisticated means).

76. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (noting the district court can exercise its discretion in deciding which party should incur the cost of complying with a discovery order); Bacon, *supra* note 2, at 21 (noting that courts sometimes require the requesting party to pay the cost of electronic discovery and at other times require the parties split the cost of electronic discovery) (citing *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 Civ.8272, 2002 U.S. Dist. Lexis 8308, at *23 (S.D.N.Y. May 9, 2002); *Byers v. Illinois*

court will manage discovery cost issues.⁷⁷ In addition, courts also retain discretion to restrict the extent of discovery.⁷⁸

1. Court's Use of Discretion

The United States District Court for the Eastern District of Arkansas addressed a discovery cost issue in *Concord Boat Corp. v. Brunswick Corp.*⁷⁹ In *Concord*, Brunswick objected to the plaintiff's motion to compel discovery of electronically stored information on the grounds that it would result in "unbearable expense."⁸⁰ The plaintiff's motion requested the following:

[A]ll electronic mail . . . files, including all current and backed-up versions of the files [A]ll versions, electronic and otherwise, of up to 1,000 documents [F]or Brunswick's marine-related divisions and headquarters to identify, restore and produce all deleted and destroyed documents on their computer systems for the last five years [And] to . . . search . . . each computer at each Brunswick location.⁸¹

In response, Brunswick argued that to comply with the plaintiff's demands would result in not only "unbearable expense and interruption in conducting its business," but also that it would be impossible to comply with the request.⁸²

The court's solution was to order the parties to propose solutions regarding the request for e-mail files for discussion at a telephone conference.⁸³ The court then stated that the plaintiff should specifically identify which of the 1000 requested documents should be produced and why they should be produced.⁸⁴ Further,

State Police, No. 99-C-8105, 2002 U.S. Dist. Lexis 9861, at *35-37 (N.D. Ill. May 31, 2002); *In re Bristol-Myers Squibb Sec. Litig.*, 205 F.R.D. 437 (D. N.J. 2002)).

77. See Brown, *supra* note 73, at 398 (noting that "courts have not settled which party should ultimately bear the costs of electronic document production"). Some courts apply the traditional approach that companies using varied technologies assume the risks of discovery costs. See *id.* at 399 (noting that one court recently attempted to formulate an eight-point set of guidelines to determine how to distribute electronic discovery costs) (citing Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002)).

78. FED. R. CIV. P. 34(a) advisory committee's note.

79. *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1996 WL 33347247, at *1 (E.D. Ark. Dec. 23, 1996).

80. *Id.*

81. *Id.* (emphasis added).

82. *Id.*

83. *Id.* at *3.

84. *Id.*

the court denied the plaintiff's request for restoration of all deleted and destroyed documents on Brunswick's computer systems on the grounds that the request appeared unduly burdensome.⁸⁵ The court deferred its decision regarding what current electronic data of Brunswick should be extracted and produced.⁸⁶ Instead, the court ordered Brunswick to provide a detailed description of all electronically stored information it maintained to the court and to the plaintiff.⁸⁷

The court's decision to grant the motion in part, deny it in part, and defer it in part illustrates the merit of both parties' positions.⁸⁸ On the one hand, the court acknowledged the plaintiff's concern that Brunswick's initial document and information search was incomplete.⁸⁹ On the other hand, the court acknowledged that Brunswick conducted a careful search.⁹⁰ However, the court noted, "[a]n all-encompassing search of all files, including e-mail, location of early versions of 1,000 files[,] and restoration of all documents deleted in the last five years would clearly be extremely burdensome."⁹¹

The discovery dispute in *Concord* did not end here.⁹² In a subsequent proceeding, the plaintiff again moved to compel production of e-mail.⁹³ This time, the plaintiff requested that the court order Brunswick to produce *all* e-mail in its computer system.⁹⁴ The request for discovery of all of Brunswick's e-mail encompassed two separate e-mail systems.⁹⁵ Brunswick's issue in complying with the plaintiff's production request was that e-mail recovery from the older e-mail system would require searching backup tapes.⁹⁶ Further, to avoid disrupting Brunswick's

85. *Id.*

86. *Id.* at *4.

87. *Id.* at *4-5.

88. *See id.* at *2 (noting "[t]here is merit to both sides' positions").

89. *Id.*

90. *Id.*

91. *Id.*

92. *See Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 33352759, at *1 (E.D. Ark. Aug. 29, 1997) (stating that over the last year, the parties had attempted to resolve numerous issues regarding electronic information).

93. *Id.*

94. *Id.*

95. *See id.* (noting that when the present action commenced, defendant utilized an e-mail system named "Fisher" and subsequently that defendant began utilizing the Lotus Notes e-mail system).

96. *Id.* at *8-9.

continuing data-processing activities, Brunswick would need to duplicate its computing environment at the time of creation of the backup tape.⁹⁷

The court recognized the significant cost implications that would result from this request.⁹⁸ The court also noted that the potential gains were questionable because of the limited number of backup tapes available.⁹⁹ Consequently, the court did not require Brunswick to produce e-mail from the older e-mail system.¹⁰⁰ The court did, however, order Brunswick to search its existing e-mail system for relevant e-mail.¹⁰¹

Concord provides a good illustration of how courts wrestle with electronic discovery cost issues. Courts analyze specific facts to reach a conclusion, without relying on procedural rules, demonstrating to practitioners that courts use discretion in resolving electronic discovery disputes. However, although the court weighed cost implications against potential information gains, the *Concord* case is not proactive because it fails to provide a clear set of guidelines regarding how courts will manage future electronic discovery disputes.

2. *Broad Discovery Request Results in Denial of Motion to Compel Discovery*

In *Toghiyany v. AmeriGas Propane, Inc.*,¹⁰² the Eighth Circuit Court of Appeals considered a motion to compel discovery.¹⁰³ The plaintiff in *Toghiyany* appealed a decision by the district court denying the plaintiff's motion to compel discovery of e-mail.¹⁰⁴ The appellate court reviewed the district court's denial of the motion to compel discovery for gross abuse of discretion.¹⁰⁵

The plaintiff's request for production included "any and all e-mails concerning [p]laintiff . . . or his business."¹⁰⁶ The defendant argued that the plaintiff's request was "overbroad and unduly

97. *Id.* at *9.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. 309 F.3d 1088, 1090 (8th Cir. 2002).

103. *Id.*

104. *Id.* at 1093.

105. *Id.* (citing *Duffy v. Wolle*, 123 F.3d 1026, 1040 (8th Cir. 1997)).

106. Brief for Appellant at 45 n.1, *Toghiyany v. AmeriGas Propane, Inc.*, 309 F.3d 1088 (8th Cir. 2002) (No. 02-1283).

burdensome.”¹⁰⁷ The defendant presented evidence in support of this argument, illustrating that to comply with the plaintiff’s request it would take 1758 hours of a technical professional’s time and approximately \$31,505 worth of computer equipment to restore and review the e-mail messages requested.¹⁰⁸ The defendant even offered to make arrangements to comply with the plaintiff’s request if the plaintiff would agree to pay for the technical professional’s time and the equipment.¹⁰⁹ The plaintiff did not respond to the defendant’s offer¹¹⁰ and the district court subsequently denied the plaintiff’s motion to compel.¹¹¹

On appeal, the plaintiff argued that the district court erred by not providing any reasons for the denial.¹¹² The plaintiff asserted that to determine whether a discovery request is unduly burdensome, the court should weigh the benefit and burden of discovery.¹¹³ In response, the defendant argued that the court did not abuse its discretion in denying the motion to compel because the plaintiff did not provide sufficient support to overcome the defendant’s objection to the motion.¹¹⁴

The defendant noted that the plaintiff’s request would have required it to scour “thousands of archived e-mails from backup tapes, of which only a tiny fraction involved the relevant employees’ e-mails.”¹¹⁵ In an effort to show the court the complexities involved in complying with the plaintiff’s request, the defendant provided the court with links to two web sites detailing the archived file recovery process.¹¹⁶ In response, the plaintiff asserted that it was an abuse of discretion for the trial court to not inquire into the feasibility of the defendant recovering a few select e-mails.¹¹⁷ The appellate court affirmed the district court’s decision denying the plaintiff’s motion to compel.¹¹⁸

Toghiyany provides an example of how a court can manage

107. Brief for Appellee at 16, *Toghiyany* (No. 02-1283).

108. *Id.* at 54.

109. *Id.* at 54 n.11.

110. *Id.*

111. *Id.* at 1.

112. Brief for Appellant at 47, *Toghiyany* (No. 02-1283).

113. *Id.* at 46 (citing *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1053-54 (S.D. Cal. 1999)).

114. Brief for Appellee at 53, *Toghiyany* (No. 02-1283).

115. *Id.*

116. *Id.* at 54.

117. Reply Brief for Appellant at 20, *Toghiyany* (No. 02-1283).

118. *Toghiyany*, 309 F.3d at 1093.

electronic discovery cost issues by simply denying a motion to compel discovery. The plaintiff's unresponsiveness to the defendant's offer to comply with the request on the condition that the plaintiff incur the cost of recovery may logically have influenced the appellate court's decision. Nevertheless, *Toghiyany* illustrates that when a party's request is overly broad or irrelevant, a court may completely deny recovery of information, not simply limit recovery to what is reasonable and cost effective.

3. *Zubulake: Second Circuit Court Guideline*

Recently, a decision from the Southern District of New York addressed the question of how to determine which party should pay for electronic discovery.¹¹⁹ *Zubulake v. UBS Warburg, L.L.C.* involved allegations of employment discrimination, including gender discrimination, failure to promote, and retaliation.¹²⁰ To support her claim, the plaintiff-employee requested evidence stored on the defendants-employers' backup tapes that was available only through a costly and time-consuming data retrieval process.¹²¹ The issue for the court was which party should bear the cost of restoring and producing the backup tapes.¹²²

Initially, to provide a framework for the court's cost-shifting analysis, the judge ordered the defendants to restore and produce e-mail from five of the ninety-four backup tapes that the defendants identified as containing relevant documents.¹²³ The defendants hired an outside vendor to perform the data restoration.¹²⁴ The plaintiff selected the backup tapes that she wanted restored.¹²⁵ The outside vendor was required not only to restore the identified tapes, but also to search through the restored e-mails for identified subject information such as the plaintiff's name or initials.¹²⁶ In return for the outside vendor's services, the vendor billed the

119. *Zubulake v. UBS Warburg L.L.C.*, 216 F.R.D. 280, 281-82 (S.D.N.Y. 2003).

120. *Id.* at 281.

121. *Id.*

122. *Id.* at 282.

123. *Id.*

124. *Id.*

125. *Id.* As an illustration of the amount of electronic information available with this type of request, the backup tapes corresponded to five months of e-mail sent to or from the plaintiff's immediate supervisor. *Id.* at 281-82. The outside vendor restored the information and the restoration yielded a total of 8344 e-mails. *Id.* at 282.

126. *Id.*

defendants \$11,524.63.¹²⁷ The vendor's bill included both the restoration services and the use of its computer systems.¹²⁸ In addition to the outside vendor costs, the defendants incurred legal fees for document review production.¹²⁹ Consequently, the total cost incurred in restoring five backup tapes was \$19,003.43.¹³⁰

Faced with escalating discovery costs, the defendants asked the court to shift any further production costs to the plaintiff.¹³¹ Based on the initial cost of restoring the five tapes, the defendants estimated that the total cost of restoring the requested documents would equal approximately \$273,600.¹³²

The court commenced the analysis of a possible cost shift by referencing general rules governing the discovery process.¹³³ In particular, the court noted that FRCP 26(b)(2) provides a proportionality test governing the permissibility of discovery.¹³⁴ The court cited *Oppenheimer Fund, Inc. v. Sanders*¹³⁵ for the proposition that " 'the responding party must bear the expense of complying with discovery requests,' [and] requests that run afoul of the Rule 26(b)(2) proportionality test may subject the requesting party to protective orders under Rule 26(c), 'including orders conditioning discovery on the requesting party's payment of the costs of discovery.' " ¹³⁶

Prior to identifying the factors used to determine the appropriateness of cost shifting, the court noted that cost shifting is potentially appropriate only when a party seeks *inaccessible* data.¹³⁷ The *Zubulake* court then identified a list of seven factors to determine which party should pay for discovery of inaccessible data:¹³⁸

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of

127. *Id.* at 283.

128. *Id.* at 282.

129. *Id.* at 283.

130. *Id.*

131. *Id.*

132. *See id.* (calculating an additional \$165,954.67 to restore and search the remaining backup tapes, and an additional \$107,694.72 in attorney and paralegal document review costs).

133. *Id.* at 283 (referencing FED. R. CIV. P. 26(b)(1)-(2)).

134. *Id.* (citing FED. R. CIV. P. 26(b)(2)).

135. 437 U.S. 340 (1978).

136. *Zubulake*, 216 F.R.D. at 283 (quoting *Oppenheimer*, 437 U.S. at 358).

137. *Id.* at 284.

138. *Id.*

such information from other sources; 3. The total cost of production, compared to the amount in controversy; 4. The total cost of production, compared to the resources available to each party; 5. The relative ability of each party to control costs and its incentive to do so; 6. The importance of the issues at stake in the litigation; and 7. The relative benefits to the parties of obtaining the information.¹³⁹

Noting the concern of commentators regarding an eight-factor test articulated in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,¹⁴⁰ the *Zubulake* court modified the list of factors.¹⁴¹ The court stated that the seven factors were “designed to simplify application of the Rule 26(b)(2) proportionality test in the context of electronic data”¹⁴²

The court noted that in the future courts should weigh the factors in the order listed.¹⁴³ In particular, the court stated the most weight should be given to factors one and two.¹⁴⁴ Nevertheless, the court reiterated, “a list of factors is not merely a matter of counting and adding; it is only a guide.”¹⁴⁵

In *Zubulake*, the court concluded that the parties should share the costs.¹⁴⁶ The court ordered the defendants to bear seventy-five percent and the plaintiff twenty-five percent of the restoration costs.¹⁴⁷ The court weighed the seven factors and found that some

139. *Id.*

140. 205 F.R.D. 421, 429 (S.D.N.Y. 2002), *aff'd*, 2002 WL 975713 (S.D.N.Y. May 9, 2002).

141. See *Zubulake*, 216 F.R.D. at 284 (quoting commentators that the *Rowe* factors “tend to favor the responding party, and frequently result in shifting the costs of electronic discovery to the requesting party”). The *Rowe* court suggested consideration of the following eight factors before shifting costs to the requesting party:

The specificity of the discovery requests . . . ; The likelihood of a successful search . . . ; The availability of such information from other sources . . . ; The purposes for which the responding party maintains the requested data . . . ; The relative benefit to the parties of obtaining the information . . . ; The total cost associated with production . . . ; The relative ability of each party to control costs and its incentive to do so . . . ; The resources available to each party

Brown & Weiner, *supra* note 9, at 15-16 (referencing *Rowe*, 205 F.R.D. 421 (S.D.N.Y. 2002) *aff'd*, 2002 WL 975713 (S.D.N.Y. May 9, 2002)).

142. *Zubulake*, 216 F.R.D. at 284.

143. *Id.*

144. *Id.*

145. *Id.* at 289.

146. *Id.*

147. *Id.* at 291.

of the factors disfavored cost shifting, but only “*slightly so*.”¹⁴⁸ Further, the court reasoned that the success of the document search was somewhat speculative; therefore, the plaintiff should bear some of the costs.¹⁴⁹ The court concluded the “precise allocation [of costs] is a matter of judgment and fairness rather than a mathematical consequence of the seven factors discussed above.”¹⁵⁰ By requiring the plaintiff to bear some of the costs, the court concluded that the partial cost shift ensured the defendants’ cost would not be unduly burdensome, while also ensuring that it would not chill the right of the plaintiff to pursue a claim.¹⁵¹

Zubulake again provides an illustration of how courts apply discretion when resolving discovery disputes. By identifying seven factors, the court provides a general guideline for attorneys to consider when faced with discovery cost issues.¹⁵² In addition, by applying more weight to specific factors, the court recognizes a party’s effort in specifying its discovery needs. The court also recognizes the importance of confining a discovery request to relevant information that is unavailable from other sources. The effect of the *Zubulake* court’s seven-factor test is twofold. First, it provides relief to a party that receives an unduly burdensome discovery request by providing rationale for the court to either shift the cost to the requesting party, or to order the parties to share the cost. Second, it rewards a party that carefully confines its discovery request to relevant and otherwise unavailable information by denying a responding party’s request to shift or share discovery costs.

C. Evidence Spoliation

A final issue resulting from use of electronic evidence is spoliation,¹⁵³ which the federal rules do not directly address.¹⁵⁴ Success of the discovery process is dependant upon and

148. *Id.* at 289.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 284.

153. *See supra* note 46 and accompanying text.

154. *See Redish, supra* note 46, at 628 n.212 (noting that “[a]lthough Rule 37(b)(2) authorizes sanctions for the failure to permit discovery, this authority under the rules often has been construed to be confined to situations in which the party destroyed evidence following issuance of a discovery order”).

intertwined with spoliation issues.¹⁵⁵ Companies are taking proactive measures to help ensure that if they receive a broad discovery request, they will not need to search gigabytes of information.¹⁵⁶ By effectively managing information, companies can better determine what is and what is not relevant information in response to a discovery request.¹⁵⁷ Companies must nevertheless remain cognizant of the fact that although they follow document-retention and document-management policies, they cannot destroy documents when the documents are subject to litigation.¹⁵⁸

Under the spoliation of evidence doctrine, if a company has not retained relevant documents, including computerized information, a court may award the requesting party with a specific jury instruction, or possibly entry of judgment.¹⁵⁹ Courts vary in determining when spoliation actually occurs.¹⁶⁰ When spoliation occurs is important because of the potential sanctions a court may order in response to spoliation of evidence.¹⁶¹ Courts view the selective destruction of documents with a wary eye.¹⁶² Parties can nevertheless find some solace in the fact that courts do not penalize parties when a party can demonstrate that document destruction was done in good faith.¹⁶³

155. *Id.* at 619.

156. See Kenneth K. Dort & George R. Spatz, *Discovery in the Digital Era: Considerations for Corporate Counsel*, 20 No. 9 COMPUTER & INTERNET LAW, 11, 16-17 (Sept. 2003) (noting that companies are implementing document retention policies and document management procedures to help streamline the production process in the event of litigation).

157. *Id.* at 17.

158. Ballon, *supra* note 45, at 9-10.

159. See *id.* at 9 (stating that “spoliation of evidence may result in the entry of judgment, an adverse inference[,] or merely an award of attorney’s fees, depending on the severity and significance of the destruction to the case at bar and the destroying party’s intent”).

160. See Redish, *supra* note 46, at 628 n.214 (contrasting a decision where the court concluded spoliation cannot be found before the lawsuit commenced with a decision where the court found a duty to preserve evidence arises when the party possessing the evidence has notice of its relevance) (citing *Giant Food Stores, Inc. v. K-Mart Corp.*, No. 94-6817, 1996 U.S. Dist. LEXIS 17831, at *6-7 (E.D. Pa. Dec. 4, 1996); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991)).

161. *Id.* at 620.

162. Dort & Spatz, *supra* note 156, at 17 (citing Patrick Grady, *Discovery of Computer Stored Documents & Computer Based Litigation Support Systems: Why Give Up More than Necessary?*, 14 J. MARSHALL J. COMPUTER & INFO. L. 523, 542 (1996)).

163. *Id.* (citing *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1112 (8th Cir. 1988)).

1. *Good Faith Required When Implementing a Record Retention Policy*

In *Lewy v. Remington Arms Co., Inc.*, the Eighth Circuit addressed spoliation of evidence under a record-retention policy.¹⁶⁴ At trial, the plaintiffs requested a jury instruction because Remington was unable to produce several documents that were destroyed under its record-retention policy.¹⁶⁵ On appeal, Remington asserted that the district court erred by providing a jury instruction that allowed the jury to find a negative inference when a party could have produced a record but did not.¹⁶⁶

The court remanded the case to determine whether the jury instruction was proper and instructed the trial court to consider three factors before deciding to give the jury an instruction regarding the failure to produce evidence.¹⁶⁷ The three factors were: (1) whether a record-retention policy is reasonable considering the facts and circumstances surrounding the relevant documents; (2) whether lawsuits concerning the complaint or related complaints have been filed, including the magnitude and frequency of such complaints; and (3) whether the document-retention policy was instituted in bad faith.¹⁶⁸

The court concluded that it may be proper to give an instruction similar to the instruction requested by the plaintiffs when a company institutes a document-retention policy in bad faith.¹⁶⁹ In addition, the court noted that even if a document-retention policy did exist, a company might need to retain certain documents.¹⁷⁰ The court bluntly stated that “a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.”¹⁷¹

In addition to its three-factor test, *Lewy* demonstrates that if a corporation implements a document-retention policy in bad faith,

164. *Lewy*, 836 F.2d 1104.

165. *Id.* at 1111.

166. *See id.* (instructing the jury that “[i]f a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not”).

167. *Id.* at 1112.

168. *Id.* (citing *Gumbs v. Int’l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983)).

169. *See Lewy*, 836 F.2d at 1112 (stating that an adverse jury instruction may be proper when a company institutes a document retention policy for the purpose of limiting damaging evidence available to potential plaintiffs).

170. *Id.*

171. *Id.* (citing *Gumbs*, 718 F.2d at 96).

and it later finds itself involved in litigation, a court can sanction the corporation by issuing a jury instruction permitting the jury to form inferences adverse to the corporation. The underlying premise from *Lewy* is that once faced with pending litigation, a party must act in good faith to preserve and make available relevant information.

2. *Sanctions for Non-Compliance with Pretrial Discovery Orders*

In *Lexis-Nexis v. Beer*, the District Court of Minnesota awarded sanctions when the defendant did not comply with pretrial discovery orders.¹⁷² The defendant left his job as an account manager with Lexis-Nexis and went to work for another online information services organization.¹⁷³ When he left employment with Lexis-Nexis, the defendant proceeded to copy a customer-contact database and hundreds of Lexis-Nexis e-mails from his Lexis-Nexis laptop and then transferred the information to his new employer-supplied laptop.¹⁷⁴ The defendant also deleted what he thought was outdated information from his Lexis-Nexis laptop, and he threw away the disk that he used to transfer the database and e-mail information.¹⁷⁵

When Lexis-Nexis learned that the defendant began working with the new online services company, Lexis-Nexis demanded that he return all Lexis-Nexis documents to the company.¹⁷⁶ Lexis-Nexis brought suit after the defendant did not respond to its request.¹⁷⁷ Subsequently, Lexis-Nexis motioned for expedited discovery and filed its first set of requests for production of documents.¹⁷⁸ The defendant confirmed that he would produce all non-privileged responsive documents.¹⁷⁹

Throughout the expedited discovery process the parties exchanged data that later turned out to be a reconstructed version of the customer-contact database rather than the complete database, which the court had ordered.¹⁸⁰ In addition, the defendant confirmed that he deleted an earlier version of the

172. *Lexis-Nexis v. Beer*, 41 F. Supp. 2d 950, 955 (D. Minn. 1999).

173. *Id.* at 952.

174. *Id.*

175. *Id.*

176. *Id.* at 952-53.

177. *Id.* at 953.

178. *Id.*

179. *Id.*

180. *Id.*

database from his computer.¹⁸¹ The defendant's counsel then attempted to make an image copy of the laptop's hard drive, and in doing so, defendant's counsel inadvertently overwrote the remnants of some previously deleted information.¹⁸² Lexis-Nexis sought the help of a computer-forensics expert to analyze the deleted files from the defendant's new laptop.¹⁸³ The expert concluded that the defendant deleted a number of important Lexis-Nexis documents.¹⁸⁴ Subsequently, Lexis-Nexis motioned for sanctions against the defendant.¹⁸⁵

The court noted that under Rule 37(b)(2), when a party violates a discovery order, the court "may make such orders in regard to the failure as are just."¹⁸⁶ Referencing Eighth Circuit precedent, the court "stated that '[s]anctions may be imposed against a litigant who is on notice that documents and information in his possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information.'"¹⁸⁷ The court summarized that "sanctions are appropriate when a party (1) destroys (2) discoverable material (3) which the party knew or should have known (4) was relevant to pending, imminent, or reasonably foreseeable litigation."¹⁸⁸

The conflicting facts asserted by each party led the court to conclude that Lexis-Nexis satisfied the last three elements of its destruction-of-evidence claim.¹⁸⁹ However, Lexis-Nexis did not convince the court on the most important element of the claim: that the defendant destroyed relevant evidence.¹⁹⁰ After Lexis-Nexis filed its motion for sanctions, the parties discovered that the

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *See id.* at 953-54 (noting that the basis for Lexis-Nexis' motion for sanctions was that earlier the court issued a temporary restraining order against the defendant in order to ensure that he would deliver the copy of the database that he made to Lexis-Nexis and that he was not to retain a copy, and that defendant destroyed evidence).

186. *Id.* at 954.

187. *Id.* (citing *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 266 (8th Cir. 1993) (quoting *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)).

188. *Id.* (quoting *JAMIE S. GORELICK ET AL.*, *DESTRUCTION OF EVIDENCE* § 3.8, at 88 (1989)).

189. *Id.*

190. *Id.*

documents, which the parties believed were deleted, were inadvertently transferred to the defendant's new laptop.¹⁹¹ Further, the court noted that although the defendant's counsel inadvertently overwrote some data while making a copy of the defendant's hard drive, Lexis-Nexis did not demonstrate that any of the lost data would have contained relevant information.¹⁹² The court then stated that even if it were to find that some of the relevant information had not been overwritten, Lexis-Nexis failed to demonstrate that the loss of evidence would prejudice its case.¹⁹³

In reaching its conclusion, the court stated that there was little reason to believe that the lost information was substantially different from that of the preserved information.¹⁹⁴ The court was not willing to presume that the overwritten computer data contained any more sensitive evidence than what Lexis-Nexis hoped to find at the outset.¹⁹⁵ Consequently, the court determined that it would not draw any adverse inferences when evaluating Lexis-Nexis' request for a preliminary injunction.¹⁹⁶

Aside from the preliminary injunction motion, the court concluded that the defendant's conduct warranted monetary sanctions.¹⁹⁷ Focusing on the defendant's conduct¹⁹⁸ and his delay in revealing information to Lexis-Nexis, the court concluded that the defendant's actions "set off a high-tech wild goose chase that has needlessly multiplied the time and expense of this litigation."¹⁹⁹ The court reserved judgment regarding the size of the monetary sanction because the litigation was still at an early stage.²⁰⁰ Wanting a more complete factual picture to emerge before assessing fees and costs, the court requested Lexis-Nexis to renew its motion at a more appropriate time.²⁰¹

191. *Id.* at 954-55.

192. *Id.* at 955.

193. *Id.*

194. *Id.*

195. *Id.*

196. *See id.* 955-56 (noting that Lexis-Nexis sought an injunction, asking the court to order termination of the defendant's employment with his new employer).

197. *Id.* at 955.

198. *See id.* (noting the defendant created a new copy of the customer-contact database rather than simply turning over the database as it existed at the time of the hearing, and he copied the information after the court ordered him to not do so).

199. *Id.* at 956.

200. *Id.*

201. *Id.*

The *Lexis-Nexis* case provides a good illustration of how what appears to be a simple discovery request can turn into a costly discovery dispute. In its conclusion, the court even noted how the defendant's conduct unnecessarily multiplied the time and expense involved in discovery.²⁰² *Lexis-Nexis* clearly articulates what a court will require of a party when it files a motion for discovery sanctions on the premise of destruction of evidence. *Lexis-Nexis* should further alert parties that even if the party motioning for sanctions cannot prove all elements of its destruction-of-evidence claim, including the most important element that the other party actually destroyed relevant information, the court can use discretion and award monetary sanctions if the party does not follow the court's instructions regarding electronic evidence exactly.

IV. CONCLUSION

Technology continues to evolve.²⁰³ As a result, issues regarding use of electronic evidence will only become more common.²⁰⁴ Although one purpose of the Federal Rules of Civil Procedure is to promote efficiency,²⁰⁵ case law illustrates that, at times, discovery involving electronic information is far from efficient.²⁰⁶

202. *Id.*

203. See, e.g., Larry Velez, *Reliable Offshore Networking*, META Group Research—Delta (Aug. 28, 2003), at <http://www.metagroup.com/cgi-bin/inetcgi/jsp/displayArticle.do?oid=42510> (last visited March 20, 2004) (discussing information technology offshore outsourcing and stating that “[w]ide-area network services will transition toward IP/VPNs . . .”) (copy on file with author); Earl Perkins & Steve Kleynhans, *Skippping Windows Generations: Migrating to Win2003*, META Group Research—Delta (Aug. 19, 2003), at <http://www.metagroup.com/cgi-bin/inetcgi/jsp/displayArticle.do?oid=42384> (last visited March 20, 2004) (discussing corporate server operating system migration strategies and noting that the sunset of Microsoft Windows NT support is leading some organizations to skip a migration to Win2000 and instead organizations are migrating to Win2003) (copy on file with author).

204. See Brown & Weiner, *supra* note 9, at 17 (“Computers and their progeny are here to stay until technology advances beyond these limitations. Until then, lawyers practicing in this digital age must appreciate their obligations with respect to handling electronic evidence, including how to locate, preserve[,] and produce such evidence . . .”).

205. See *supra* note 21 and accompanying text.

206. See *Lexis-Nexis*, 41 F. Supp. 2d at 956 (stating defendant complicated matters and “set off a high-tech wild goose chase”); see also Scheindlin & Rabkin, *supra* note 2, at 378 (asserting that trial courts’ resolution of electronic discovery disputes results in a “patchwork of varying discovery ‘rules’ across the country” and does not enhance the efficiency of electronic discovery).

Today when a discovery dispute involves a request for either electronic information that appears unduly burdensome, or where the information is no longer available, decisions by district courts in the Eighth Circuit provide little guidance regarding how it will act. Parties should proceed through discovery by responding in good faith to discovery requests. In addition, parties must act in good faith to preserve relevant information that is or may be subject to litigation. Nevertheless, practicing attorneys know that a case will arise where one party will receive an unduly burdensome request, or the attorney's client has destroyed (possibly in good faith) relevant information subject to litigation. When such situations arise, courts will make decisions on an ad hoc basis and at times courts may apply guidelines or tests that vary from one case to the next.

As noted in *Antioch*, the court examines case-specific facts to reach a decision regarding how to manage discovery of electronic information.²⁰⁷ There is no evidence that the court, as compared to the parties, is in a better position to understand the mechanics involved in recovering archived information. Based on the decision in *Antioch*, it appears that the court relies on guidance from other courts to determine the course of action.²⁰⁸ In addition, a detailed, well-articulated brief may help influence the court in determining the course of action. Consequently, attorneys involved in electronic discovery disputes should take notice that a carefully crafted brief may protect the client by ensuring the other party produces relevant information, or by saving the client from searching endlessly for unnecessary information.

Electronic discovery cost disputes are one of the most troublesome areas where courts make decisions on an ad hoc basis. *Concord*, *Toghiyany*, and *Zubulake* provide examples of how the courts apply discretion when determining which party should bear the cost of electronic discovery.²⁰⁹ Aside from the seven-factor test denoted by a court within the Second Circuit in *Zubulake*, attorneys have very little guidance regarding how a court might decide which party will bear the cost of electronic discovery. Because the federal rules do not adequately address how to manage electronic

207. See *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 649-52 (D. Minn. 2002).

208. See *supra* note 52 and accompanying text.

209. See *supra* Part III.B (analyzing resolution of electronic discovery cost disputes).

discovery, the outcome of electronic discovery cost disputes is unpredictable.

It is uncertain how the district courts within the Eighth Circuit will reach a decision regarding electronic discovery costs. An Eighth Circuit district court may adopt the seven-factor test established in *Zubulake*, but even the *Zubulake* court noted that the factors simply provide a guideline. Without adopting the *Zubulake* seven-factor test, the Eighth Circuit district courts will most likely continue to use discretion on a case-by-case basis, providing little guidance for attorneys. By analyzing the facts of a case, rather than establishing a general guideline, Eighth Circuit district courts that encounter electronic discovery cost disputes will witness time-consuming and expensive litigation.

The issue regarding evidence spoliation is one additional electronic discovery issue where courts have flexibility and again apply discretion in resolving the dispute.²¹⁰ Although parties strive to manage information effectively so they are able to locate relevant information when they receive an extensive discovery request for documents, the parties must act in good faith to avoid inadvertent destruction of relevant information. Destruction of relevant information will result in sanctions.²¹¹

Although courts act with discretion in applying sanctions for destruction of evidence, *Lewy* and *Lexis-Nexis* illustrate that sanctions can vary from an adverse jury instruction to monetary sanctions.²¹² In addition, in the event a party cannot prove destruction of the evidence, a court may still impose monetary sanctions.²¹³ Although attorneys know that a court will impose sanctions for willful destruction of relevant documents, the courts' use of discretion in determining the type of sanction to impose again leaves attorneys guessing.

Antioch, *Concord*, *Toghyany*, *Zubulake*, *Lewy*, and *Lexis-Nexis* all illustrate how courts analyze electronic discovery disputes,

210. See *supra* Part III.C (discussing electronic evidence spoliation and the range of possible sanctions).

211. Cf. Redish, *supra* note 45, at 620 (noting that the question regarding evidence spoliation is one regarding what the appropriate sanction should be for violating the duty of preservation).

212. Compare *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (stating that an adverse jury instruction may be proper when a company implements a document-retention policy in bad faith) with *Lexis-Nexis v. Beer*, 41 F. Supp. 2d 950, 955 (D. Minn. 1999) (concluding that defendant's conduct warranted monetary sanctions).

213. *Lexis-Nexis*, 41 F. Supp. 2d at 954.

2004]

ELECTRONIC DISCOVERY DISPUTES

1057

regardless of the dispute subject, on a case-by-case basis. The result is that attorneys do not have standard guidelines to operate within when trying to resolve electronic discovery disputes. Instead, the disputes encroach on already busy court schedules. The Eighth Circuit courts, along with other circuits, appear poised to continue their pattern of time-consuming, ad hoc decision making. Until the federal rules adequately address electronic discovery, it appears that no manageable solution producing predictable results is on the horizon. Practitioners have suggested that modification of the federal rules will correct the problems associated with electronic discovery.²¹⁴ Quite possibly, the rule makers continue to let courts set electronic discovery rules on an ad hoc basis because the rule makers are unable to determine a more effective solution.

214. See Scheindlin & Rabkin, *supra* note 2, at 327, 381 (asserting that Rule 34 has shortcomings regarding how it addresses discovery of electronic information and the need to adapt the Federal Rules of Civil Procedure to electronic information, and specifically suggesting revising Rule 34 to permit courts to distinguish between paper and electronic evidence); Redish, *supra* note 45, at 626 (declaring that to take account of the use of computers and other electronic data storage means, the discovery rules need to be substantially modified); The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* 2, 6-7 (Mar. 2003), available at http://www.thesedonaconference.org/publications_html (last visited March 20, 2004) (stating that the working group rejected the argument that the Federal Rules of Civil Procedure provide an adequate framework to address issues regarding electronic discovery).